

EIR OR NEGATIVE DECLARATION?

The following is a general guideline to consider when confronted with the issue of whether or not to prepare an EIR over a negative declaration.

SUMMARY OF QUESTIONS TO ASK:

1. Is the evidence before the Commission or Council on significant adverse environmental effects “substantial” evidence? (I.e., logical and fact-based, not speculation)
2. Considering the entire record before the Commission or Council, and after the project is revised to incorporate mitigation measures, does the evidence support a *fair argument* that there *may* (not shall) be a significant effect?

SOME BACKGROUND EXPLANATION:

1. “**Substantial evidence**” is evidence that is: a) relevant; b) reasonable in nature; c) credible; and d) of solid value.

Examples of information or testimony that may constitute substantial evidence include:

- actual, hard, logical and verifiable data or facts;
- statements setting forth reasonable assumptions predicated on such facts; and,
- expert opinion supported by such facts

Examples of information or testimony that is not substantial evidence include speculation, unsubstantiated opinion, narrative, and in some cases hearsay.

2. Can a **fair argument** be made that a project **may** have a significant environmental effect? That is, is there **no** substantial evidence that the project **may** have a significant effect?

- The question is not whether the project will have a significant effect, but whether it may have such effect.
- Contrary conclusions of non-significance are not controlling over conclusions of significance. The City must prepare an EIR even where other evidence in the record supports a contrary conclusion.

This is a critical distinction from the standard which applies when the Commission or Council votes upon a special permit, such as a CUP. The Commission or Council or Council can approve a special permit on the basis of a preponderance of the evidence, even if there is substantial evidence supporting a denial. When considering whether an EIR should be prepared instead of a negative declaration, the Commission or Council or Council does not determine who has “the better” argument. Rather, any substantial evidence

that supports a fair argument that the project may have a significant effect automatically requires that an EIR be prepared, unless the project can be modified negative declaration can be amended .

- **Entire Record Must be Considered.** In determining whether a fair argument exists, the Commission or Council must consider the entire record. The entire record includes not just the staff report and written materials submitted by the applicant and members of the public, but oral and written testimony submitted at the hearing, as well. This may mean some Commissioners or Councilmember may change their point of view during the public meeting if additional evidence is provided making a fair argument of a significant impact or a strong argument that mitigation measures can be implemented to reduce project impacts to a level below significance.
- **Some effects are automatically deemed significant.** The following impacts are deemed “significant” as a matter of law:
 - Cumulative impacts, where the project by itself may not cause an impact but its impact is significant when considered in the context of projects having similar impacts.
 - Substantial impacts upon fish or wildlife resources, including but not limited to reductions in numbers of threatened or endangered species.
 - Loss of a significant historic or archeologic resource.
 - Long-term, as opposed to temporary, impacts.
- **Mitigated Negative Declarations Allowed.** Projects that would otherwise be determined to be significant under the above analysis may be mitigated to a level of insignificance without requiring an EIR.

In order to rely upon a mitigated negative declaration prior to approving a project, the Commission or Council must be satisfied that the following have been met:

- The project has been revised to substantially reduce or eliminate any of the potential significant impacts.
- There should be a mitigation monitoring program and checklist adopted with the project to ensure that steps are taken throughout project development and operation that continue protecting the environment.
- Mitigated negative declarations cannot be used where substantial evidence establishes that, despite project revisions or modifications, there is still the potential for a significant environmental effect.